No.474603-II

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON -
Division II

DEBRA KOSHELNIK and GLEN TURNER
individually and the marital community consisting thereof, and Estate of Evelyn Koshelnik, through Debra Koshelnik Personal Administrator

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, SUSAN N. DREYFUS, Secretary of Social and Health Services, LINDA ROLFE, Director, Division of Developmental Disabilities of DSHS, CONNIE WASMUNDT, EVELYN CANTRELL, LOREN JUHNKE, and BARBARA UEHARA, employees of DSHS and unknown Supervisors

Appellees.

Reply Brief

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pm 2/9/16

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I FACTS:

Appellants adopt the Statement facts set forth in out opening brief.

II INTRODUCTION:

There really are only two issues in this case. The State has very effectively obscured those issues with legal theories and defenses that do not apply.

Here are the dispositive issues for this court in this case:

Have plaintiffs here provided admissible *facts* sufficient for a reasonable jury to find that the State's and the individual defendants' continued pursuit of Debra Koshelnik for abuse was not taken in furtherance of its mission under Chapter 74.34 RCW, but in bad faith, with knowledge that she was not guilty of legal abuse, nor was she a danger to any vulnerable adult, but solely for the purpose of excluding her from contracting in order to save the Department money?

If so was this pursuit in reckless disregard of Plaintiffs' well being as a family and individually, in a way Defendants knew or should have known was likely to cause extreme financial hardship and emotional distress?

Does Allie Joiner's unchallenged expert testimony about the specific vulnerabilities of elderly deaf persons, especially women, raise triable issues as to

whether the State defendants' apparent ignorance and lack of systemic training about such vulnerabilities deprived her of life and her family of her love and affection?

III REPLY ARGUMENT

1. **Evelyn Koshelnik's Case**:

Here are the defects in the State's response to the evidence proffered and and legal support in the case against the named defendants

A) Medical Causation.

The State argues there is no medical evidence of causation between the Juhnke interview of Evelyn Koshelnik and her massive stroke that immediately followed it.

The law regarding the requirement of medical evidence in cases of wrongful injury or death is that a physician's expert testimony is not necessary when a layperson describing objective observable signs and symptoms that are describable without medical training can state facts, the reasonable inferences from which would constitute causation. *Harris v. Groth*, 99 Wn. 2d 438, 449, 663 P.2d 113 (1983).

The State argues that causation is not shown, because, conceding that it is within the common knowledge of ordinary lay persons that strokes, especially hemorrhagic strokes, can be caused by extreme agitation, especially in the elderly, such strokes *can* have other causes.[1]

The State conveniently ignores the facts surrounding the genesis of *this* stroke, however, as set forth in Debra Koshelnik's sworn, unchallenged declaration at paragraph 44 (CP 231-232):

> Within minutes of their departure [Defendant Juhnke and the interpreter, Ms. Angel], when I went to my mother she became very agitated. She repeated to me several times, "I'm staying! This is my home! this is my home!" and "I love you! I love my family! I'm staying right here!" as forcefully as she could. I tried to calm her down, but she was just becoming more agitated, Suddenly she slumped over and wet herself, and started moving her hands randomly with no actual meaning, and after a few moments I realized she was having a stroke and called 911. By the time we got to the emergency room she was unconscious. They confirmed in the emergency room that it was a stroke, and it had already done a lot of damage to her. Dr. Howard showed me the brain scans they had done which showed that half of her brain was flooded with blood from the hemorrhage.
> My mother died the following day in the hospital having never regained

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1. The State appears to make light of our invoking common culture and language equating the word "apoplexy" (meaning stroke) with extreme agitation, including the several references to that correlation in the *Sherlock Holmes* fiction. But we would again point out that the author of those stories, Dr. Conan Doyle, was a physician in active practice for many years, with a number of advanced medical degrees.
(https://en.wikipedia.org/wiki/Arthur_Conan_Doyle)

consciousness.

There is certainly enough in this record to allow a reasonable jury to assume causation in *our* case absent the State's proffering evidence that there actually was some other cause.

B) Plaintiff's assertion that there is no evidence that Juhnke behaved other than completely professionally, is plainly false.

The State is hoping, we presume, that this court will forget that Evelyn was not just any elderly woman for whom Mr. Juhnke's interview might have been professional. She was an elderly deaf woman, a distinct class of person with very specific, known vulnerabilities who, moreover, had just suffered the devastating loss of her partner of over 60 years -- all facts of which Mr. Juhnke was aware.

Unless we completely discount Ms. Joiner's testimony, Mr. Juhnke's interview (or that of any imposing agent of the state who is not proficient in American Sign Language (ASL)) was *per se* not "professional" because it was most probably pre-determined to terrify its object. And both he and the supervisor who sent him into that interview either did not have the training to know this, or did have the knowledge and went ahead anyway, even after Debra warned Mr. Juhnke of the danger (Koshelnik Declaration pp. 11-12, CP 229-230). As long as this court accepts the idea that this interview was "professional," justice cannot

be had in this case, and elderly deaf women will continue to be at risk.

Ms. Joiner was quite specific about the reasons for such vulnerability within the unique nature of deaf culture (CP 248-249), and her credentials and career engaged in explaining this culture to the world and protecting the interests of the deaf, including specifically elderly deaf women, are beyond stellar CP 255.

And finally it is not insignificant that within DSHS – the very agency that we contend not only failed to protect Evelyn, but actually actively caused her death – was an office and agency, co-founded by Ms. Joiner, that had the expertise to instruct APS personnel on how to conduct interviews with persons such as Evelyn Koshelnik. CP 247, 249. There are certainly sufficient facts in this record to have a jury determine whether the failure of the agency, its agents, its supervisors, and its director to require that such expertise be a part of the training of APS agents deprived Evelyn Koshelnik of her life, wrongfully, and in violation of the basic constitutional right to life that the state may not take absent conviction for the most heinous of crimes.

C) Proximate cause

Was the behavior of defendants Barbara Uehara, Linda Rolfe, Connie

Wasmundt, and Evelyn Cantrell proximate to the wrongful death of Evelyn Koshelnik?

The concept of proximate cause girds the whole edifice of tort law. The young law student is plied with tales of helpful railroad guards, exploding bundles and falling scales in order to introduce her to the concepts of foreseeability, but-for causation, and their intersection *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

Boiled to its essence, proximate cause existed for purposes of this case, when the Department and its agents chose to use its processes, not to investigate but to destroy Debra Koshelnik and her ability to take care of her children (see section 2 below), those actions led in an unbroken line to the unfortunate interview that caused Evelyn's death, and Evelyn within the foreseeable scope of those who would be harmed. More specifically when Connie Wasmundt, and Evelyn Cantrell chose to file and prosecute findings of "substantiated abuse" in DSHS records with no evidence – other than that which the a the tribunal had already found after a full trial did not constitute abuse at all -- the court must ask the question who might be foreseeably harmed by such behavior? Added to that, Barbara Uehara filed an entirely spurious allegation of abuse (for failing to have a

non skid surface on a wheelchair ramp, which was immediately remedied (CP 228), and Defendant Juhnke cited both of these records in his report justifying the need for his ill-fated interview of Evelyn, was this a foreseeable consequence? We would argue that anyone under Debra's care could foreseeably be harmed by the DSHS campaign against Debra, and in fact Debra's mother was specifically mentioned by in the Departmental email discussion searching for ways to limit payment to the family (Appendix 14, supplemental record, attached to opeining brief), to which Barb Uehara signed on id.

> Ordinarily, foreseeability is a question of fact for the jury unless the circumstances of the injury "are so highly extraordinary or improbable as to be wholly beyond the range of expectability."

McLeod v. Grant County Sch. Dist. No. 128, 42 Wn.2d 316, 323, 255 P.2d 360 (1953)

Mr. Juhnke cited both the findings of "substantiated abuse" (CP 245) and the additional charge of abuse made by Ms. Uehara (CP 245) in his report justifying his interview with Evelyn. He has the right to explain whether these former allegations affected his demand to interview Evelyn even after he had been warned of the danger (CP 229-230), be subject to cross examination, and either be believed or not by the jury. We assert the superior court erred in taking that decision out of the jury's hands.

2. **Glen and Debra's Case**

A) Process vs. Due Process

The State argues repeatedly that all that it did in the prosecution of Debra was done according to the rules of administrative process. This fact does not necessarily constitute due process however, nor does it protect the State and its agents from liability when that process is undertaken in bad faith for improper and tortious motives. *Janaszak v. State,* 173 Wn. App. 703, 715, 297 P.3d 723 (2013); *Spencer v. King County*, 39 Wn.App. 201, 205, 692 P.2d 874 (1984).

The State also repeats like a mantra that our complaint is that the State undertook an investigation and administrative action based on an allegation that came from the school. Although they repeat it in every brief, that does not make it true.

We do not claim that as a basis for this action; we have never claimed it as a basis for this action. Let us again spell out that actual facts that constitute this constitute bad faith action, violations of due process, and multiple causes of action.

1. State, in persons of Defendants Wasmundt and Cantrell filed and prosecuted a finding of "substantiated abuse" with no evidence of such whatsoever other than

the interaction between Gini an her mother which had been exhaustively examined in a full trial and determined not to be abuse at all. This is an unappealed judicial *fact.* Ross ALJ, Summary J Order, Conclusion ## 5.8, 5.9. CP 124, CP 130. If such judicial facts are not considered to be facts worthy of presentation to the jury, then the State must provide some argument as to why they are not, rather than ignoring them.

2. The Administrative tribunal had initially not only found that the interaction complained of was not abuse, but multiple judges, including Judge Ross eclared that Debra was a paragon of enriching care for persons with disabilities and had been since her childhood. Ross Decision #1, Finding of fact #3 CP 79. Moore Decision, finding 4.28 CP 99; Conant decision (Bd. of Appeals), Conclusion #27, CP 172.). This did not stop APS from filing a finding of "substantiated abuse" and attempting to deprive Debra compensation for her care so as to make life increasingly difficult for her family.

3. At approximately the same time, Defendant Uehara signed up for the effort to find ways to limit the assistance being provided to the Koshelnik family. Supplemental record, Exhibit 14, appendix to Opening Brief. She thereafter embarked on a campaign of abuse of Debra accusing her of multiple false

allegations of incompetence, culminating in a formal report of abuse for failing to have a non-skid surface on a wheelchair ramp, which problem was immediately rectified. CP187, 191-193.

4. This campaign of abuse was documented to Defendant Linda Rolfe CP187, 191-193, the head of the division overseeing the work Ms. Uehara, who took no action.

5. The Department and its named agents never tried to protect Debra's children from her other than to stop paying her. The did not limit her interaction with vulnerable adults in any way; they were satisfied with her continuing to provide for all elements of their care and nurturing as long as they did not have to pay her for it. Ross Findings CP 82-85. Even after the administrative judges determined that no abuse had taken place

B Outrage

> The tort of outrage requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress.

Reid v. Pierce County, 136 Wn.2d 195, 202, 961 P.2d 333 (1998)

If we credit the litany of behavior above supported by multiple admiinistrative findings, there was a concerted effort to deprive Debra with the

resources with which to care for her disabled children by wrongfully branding her an abuser solely to save the State money. We would submit that a reasonable person could find such behavior extreme and outrageous; and any emotionally mature adult would recognize that such conduct would inevitably lead to extreme emotional distress in any mother, and it certainly did so in this case. We note that a finding of substantiated abuse would also prevent Debra from ever being employed in care for persons with disabilities – which is the only thing she had ever done from the time she was a small child (Koshelnik declaration at ¶¶ 2 et seq. CP 219 et seq.) We contend that these *facts* can raise jury questions of outrage.

C Conspiracy

In this case we are in the rare situation of actually peeking into the room when an agent of DSHS is soliciting a number of colleagues on ideas on ways to deprive the Koshelnik-Turner family of assistance, and we have defendant Uehara's signing on to the effort. (Supplemental record, attached to opening brief). And then we have her following up on that agreement by using her position of care assessment agent to continually persecute Debra and make spurious assertions of neglect and abuse, one of which was formally filed.

We have the Wasmundt's and Cantrell's relentless pursuit of Debra to label her an abuser, specifically one whose abuse was "substantiated" with, as the Administrative judge found, no evidence of anything that constituted abuse; and even after that finding had been reversed, we have the agency trying to find ways of not paying her

Questions of conspiracy should go to the jury.

IV CONCLUSION

The State's, the Departments' and its agents' immunities and privileges are important protections necessary to protect good faith efforts to protect vulnerable children and adults from predatory caregivers. Plaintiffs both accept and embrace this legal reality. But these protections cannot be used absent such good faith pursuit of the agency's mission, to harm the caregivers with decades of proven records of loving, nurturing care, solely to save the agency money. To this day, in none of the State's filings in any action has this action been justified by support of the Agency's statutory mission.

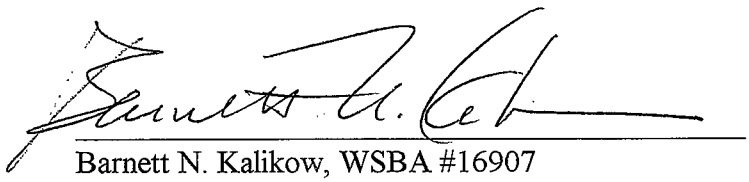
If they should now belatedly do so, a jury, not a judge acting summarily

should be allowed to determine the credibility of that justification.

Respectfully submitted,

February 8, 2016

KALIKOW LAW OFFICE



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Shaana Sweiven, hereby declares under penalty of perjury according to the laws of the State of Washington that she is of legal age and competence and that on February 8, 2016 she placed in the U.S. mail, Postage prepaid, the Memorandum to which this declaration is affixed to:

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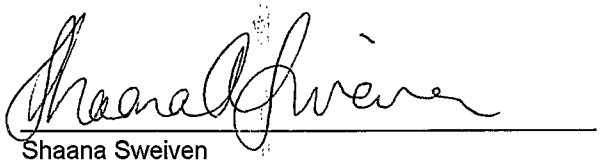
February 8, 2016



Shaana Sweiven